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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 5

FRANK JAMES LUPPER, *et al.* ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR REHEARING

BRUCE BENNETT
Attorney General
JACK L. LESSENBERRY
Chief Assistant Attorney General
State of Arkansas
Counsel for Respondent
Justice Building
Little Rock, Arkansas

PARAGON PRINTING CO., LITTLE ROCK

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The respondent, by its counsel, respectfully requests that a rehearing be granted in this cause. In the alternative, respondent urges that the convictions of petitioners be remanded to either the state court or the federal district court for hearing and determination of crucial facts which are pertinent to the application of Title II of the Civil Rights Act of 1964. In any event, respondent asks that the opinion of the court be clarified to afford respondent and other jurisdictions adequate guides to properly implement the decision rendered.

The following topics are offered by respondent in support of its prayers for relief.

I

Abatement of State Prosecutions

The conclusion of the majority of the Court was in essence that the Civil Rights Act of 1964 abates the prosecutions and convictions of participants of "sit in" demonstrations which had not been finally adjucicated.

It is not necessary to dwell on this point for its weakness has been adequately and convincingly voiced by the dissenting opinions. It should suffice to state that the holding of the majority was a violent departure from settled authority.

One matter does deserve special comment. The majority speaks of the Civil Rights Act as creating a right or substituting a right for a crime. The Act itself contains no such allusions. It merely prohibits punishment of a person who seeks to secure goods and services. See Title II, Sec 201 (a) and Sec. 203. On the other hand, the Arkansas Statute, Act 14, does not make a request for service a crime, but only condemns the refusal of a person to leave the premises upon the order of the manager of the store. Hence, there can be no conflict between the two enactments.

The majority's construction of the Civil Rights Act condoning demonstration by sitting, lying or otherwise, effectively destroys the prime objective and the high motives of the Act. The opinion constitutes an invitation to violence without punishment, or lawlessness with law.

What is truly ironical, is that a plain reading of the Act would offer a ready defense to persons now genuinely seeking service who is made the victim of ambitious prosecution and also furnishes a judicial means to vindicate the wrong.

Finally, there is a legitimate public interest in any unlawful conduct, past or future. Lawlessness can not be so lightly entertained in any sphere. The judicary should not indulge in the wisdom or expediency of legislation. Abandonment of such fundamental principles is not dictated by the circumstances present in this litigation.

II

Application of the Civil Rights Act

Aside from entanglements of interpretation of the law, this case presents pecular factual problems. The description of the incident arising in Arkansas set out in the opinion of the Court was eminently fair.

Conceding *arguendo* that the Civil Rights Act will abate some prosecutions, two important questions still remain to be answered. First: Is the tearoom located in Blass an establishment covered by Title II? Second: If so, were petitioners requested to leave on account "of race, color, religion or national origin?"

As to the former, there is probably no genuine controversy. During oral argument this was the honest appraisal of counsel for respondent based upon casual knowledge of the activities of a large department store. Purely speaking, it seems unreasonable to adversely adjudicate such a significant legal proposition in what cannot be fashioned even as an *ex parte* conclusion. All too suddenly it would appear that Blass had involuntarily and unknowingly become a real party in interest.

It should be interjected at this juncture that while it is true respondent resisted an order of remand in its Brief and during oral argument, it was because respondent

believed the Arkansas law on abatement was clear (Respondent's Brief, p.13) and that while the department store might be covered, no concession was intended to include refusal of service on the basis of petitioners' race.

Notwithstanding these several considerations, the aspect of coverage alone may not justify a remand for hearing.

The second question presents a more serious and difficult venture. There is not merely a void of evidence of refusal of service because of race. The evidence will only sustain a conclusion contrary to that reached by the Court.

Coupling both questions, each gains stature and prominence. A remand for hearing can result in no harm. The conclusion may very well be the same, but it will be founded upon evidence. If a different result is justified, none but the unfaithfull will disparage it.

III

Implementation of the Decision as to Existing and Future Cases

At the commencement of the consolidated oral argument, a comment was made that approximately 3,000 prosecutions involving demonstrators were at some stage of litigation in the several states. The only case then heard by the Arkansas Supreme Court was the case at bar and none were pending. Since this opinion was announced, attention has been brought to several prosecutions in both the municipal and circuit courts which have been suspended awaiting disposition of this cause by this Court.

Should respondent's separate prayers for reconsideration or remand be denied, there still exists a grave question as to the proper disposition of the sit in cases in Arkansas and the several other states. Moreover, since the Court deferred ruling on the validity of trespass statutes *per se*, undoubtedly future controversy will arise. In either instance, the inferior State and Federal courts do not have the benefit of any guides.

Not only judges but other officers of the judiciary, as well as responsible State officials have the obligation of advising legislative bodies, business men and law enforcement agencies.

Thus, much amplification is needed to afford timely resolution of pending cases but also to assure correct future judicial involvement.

Respondent would urge that this Court state, that in the event the Civil Rights Act of 1964 is invoked as a defense to a state prosecution, if the accused would have the burden of proving by a preponderance of the evidence the coverage of the establishment by the Act and refusal of service on the ground of race, color, or national origin.

Further, this Court should determine it the questions of coverage and the refusal of service should be a matter of law or fact.

Undoubtedly, other issues will arise. All cannot be anticipated. These basic matters have already been brought sharply to focus and are of such consequence to be deemed absolutely essential.

CONCLUSION

Much consideration has been given the decision of the Court entered in this cause and the prayers set forth in this petition.

Pursuant to the Rule 58 of the Court, respondent has endeavored to briefly and distinctly state support for its contentions.

It is respondent's sincere belief that the majority of the Court has grievously erred.

Much benefit would be gained by permitting this cause to be remanded to an appropriate hearing and fact finding tribunal. All interested parties could then be adequately heard and proper proof submitted on areas not anticipated or known at the time of petitioners' original trial. Although piecemeal trials should not be encouraged, justice should be served as expeditiously as possible. e.g. *Jackson v. Denno*, 378 U.S. 368.

It is recognized that decisions of courts do not and should not attempt to anticipate or speculate on special problems which may be created. But there are practical problems of mechanic of implementation. If the circumstances of this case are " . . . a possibly unique phenomenon . . . ." *Bell v. Maryland*, 378 U.S. at p. 235, then

the import of this decision and its far reaching effect perhaps likewise requires special instructions. cf. *Sain* v. *Townsend*, 372 U.S. 293, *Fay* v. *Noia*, 372 U.S. 391.

Respectfully submitted,

BRUCE BENNETT
Attorney General
JACK L. LESSENBERRY
Chief Assistant Attorney General
State of Arkansas
Counsel for Respondent
Justice Building
Little Rock, Arkansas

January 5, 1965

CERTIFICATE

I, Jack L. Lessenberry, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Jack L. Lessenberry